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The Immigration Laws of the United States and the Employment of Foreign Personnel

by Charles Gordon*

I. The Historical Perspective

As a nation founded by immigrants and their descendants, the United States has traditionally been hospitable to newcomers. For the first hundred years of our national life, our borders were open and people from other lands came to the United States without restriction. Federal controls over entries to the United States commenced in 1882¹ and were periodically expanded.² Numerical limitations were inaugurated as a temporary measure in 1921,³ and were made a permanent feature of our immigration laws in 1924.⁴ In 1952, Congress enacted a major recodification of the immigration laws, designated as the Immigration and Nationality Act.⁵ Although there have been major amendments of this statute,⁶ it still provides the basic framework for our system of immigration control.

The immigration formulas developed over the years have become exceedingly complex. This complexity is attributable both to an antiquated statutory scheme which entrusts enforcement responsibilities to a variety of agencies, including the Departments of Justice, State, Labor, Health and Human Services, and the United States Information

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¹ Act of Aug. 3, 1882, ch. 376, 22 Stat. 214. The Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 had previously barred the entry of convicts and prostitutes.

² See 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE §§ 1.2b, c (1983).

³ See Act of May 21, 1921, ch. 8, 42 Stat. 5.

⁴ See Act of May 24, 1924, ch. 190, 43 Stat. 153.

⁵ Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1503 (1982)) (hereinafter cited as I.N. Act). This statute also was known as the McCarran-Walter Act.

⁶ *E.g.*, Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified in scattered sections of 8 U.S.C.); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

Agency,⁷ and to the pressures generated by millions of persons who regard the United States as an oasis of freedom and security.

The world of 1983 is quite different from that of 1882. The jet plane enables us to rapidly traverse distances which, in an earlier day, would have required weeks and even months of arduous travel. The strategic and diplomatic interests of the United States and the commercial, cultural, educational, and recreational interests of its citizens are worldwide in scope and there is a reciprocal interest in like activities within the United States on the part of other nations and their citizens.

II. The Concern of Employment and the Immigration Laws

The quest for employment in the United States has always been a dominant motivation for prospective immigrants. At the same time, a significant feature of the immigration laws has been to provide protections for the American worker.⁸ In recent years, there has been widespread public discussion of an alleged invasion by illegal entrants. Proposals to curb such entries by imposing penalties on the employers of undocumented workers have been debated for a number of years and are currently under consideration by Congress.⁹ The focus of this discussion, however, is not on problems related to the employment of undocumented workers. Rather, this article considers the circumstances under which employment rights can be achieved in compliance with the immigration laws.

The concerns addressed can arise in a variety of ways. A U.S. business may be purchased by a foreign company which wishes to bring key foreign personnel to the United States, or a U.S. corporation may be seeking to employ skilled foreign workers, on a temporary or permanent basis. A multinational company may seek to transfer key executives to the United States, or a visitor to the United States may seek approval to accept employment. A person from Iran, Taiwan, or Lebanon may wish to make a substantial investment in a business which he or she will control and operate.

The need to resolve these and similar problems has produced a marked increase in professional interest. More and more law schools are offering courses in immigration law, and frequent symposia provide insight and guidance for the novice and the expert. Today, large corporations and other institutions often have staff trained to deal with immigration problems. While some law firms seek to develop skills in handling immigration matters, others customarily refer such matters to outside experts. There is a growing immigration bar, with a national

⁷ See Gordon, *The Need to Modernize Our Immigration Laws*, 13 SAN DIEGO L. REV. 1 (1975).

⁸ See, e.g., Act of Feb. 23, 1887, ch. 220, 24 Stat. 414; Act of Feb. 26, 1885, ch. 1210, 25 Stat. 565. Protection for the U.S. worker is still a significant feature of our immigration laws. See I.N. Act, *supra* note 5, § 1182(a)(14) (1982).

⁹ See *infra* note 22 and accompanying text.

association of immigration practitioners and chapters in cities and areas throughout the United States.

III. Employability Under the Immigration Laws

The employability of a job applicant in relation to the immigration laws depends on his legal status. This entails consideration of the following categories:

A. Citizens

The immigration laws are inapplicable to citizens or nationals of the United States. U.S. citizenship is acquired through birth or naturalization in the United States, or through parents.¹⁰ The prospective employee's credible assertion of U.S. citizenship when applying for a job will usually end the inquiry. If confirmation is needed, it can be supplied by a birth or naturalization certificate, or by a U.S. passport.¹¹

B. Aliens

An alien is a person who is not a citizen or national of the United States.¹² Employment applicants who are aliens will be in one of the following three groups:

(1) *Aliens lawfully admitted for permanent residence.* This status can be confirmed by the so-called "green card," which is currently colored blue and is actually an alien registration receipt card (Form I-551 or I-151), issued to all lawful permanent residents.¹³ Having been granted the right to live in the United States, the lawful permanent resident has a constitutionally protected right to work.¹⁴ State laws restricting job opportunities for lawful permanent residents are offensive to the Fourteenth Amendment's due process protections,¹⁵ unless the occupation is related to key governmental functions.¹⁶ In contrast, the paramount federal role

¹⁰ U.S. CONST. amend. XIV, § 1. *See* *Rogers v. Bellei*, 401 U.S. 815 (1971).

¹¹ Act of Aug. 24, 1982, Pub. L. No. 97-241, § 117, 96 Stat. 273, 279 (codified at 22 U.S.C. § 2705). *See* 3 C. GORDON & H. ROSENFELD, *supra* note 2, ch. 19.

¹² I.N. Act, *supra* note 5, § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1982). *See also supra* note 10 and accompanying text.

¹³ I.N. Act, *supra* note 5, § 264(d), 8 U.S.C. § 1304(d)(1982); 8 C.F.R. § 264.1 (1983).

¹⁴ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Court in *Yick Wo* considered a municipal ordinance which effectively prevented Chinese persons from operating laundries. The Court held the ordinance violated the equal protection clause of the Fourteenth Amendment, because while facially neutral, it had an unquestionable discriminatory effect. The Court added:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality

Id. at 369.

¹⁵ *See, e.g.*, *Sugarman v. Dougall*, 413 U.S. 634 (1973) (state law requiring certain classes of municipal employees to be U.S. citizens held unconstitutional).

¹⁶ *See, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (state may require that probation

in alien matters supports federal laws denying opportunities to aliens in employment by the U.S. government,¹⁷ or in private employment involving key national concerns.¹⁸ Thus, in dealing with key defense agencies, private contractors often are required to employ only U.S. citizens.

(2) *Aliens lawfully admitted for temporary stay.* This group is designated as nonimmigrants. Their right to work generally depends on the status for which temporary entry or stay was authorized. This will be shown on their entry card (Form I-94), which was issued to them at the time of entry and stapled into their passports. In some situations, special permission to work, as indicated by an "employment authorized" stamp placed on the Form I-94, is granted by the Immigration and Naturalization Service (INS).^{19 20}

(3) *Undocumented aliens or aliens violating nonimmigrant status.* Many undocumented aliens accept employment in the United States. Currently, an employer does not violate federal laws by hiring an illegal alien. The so-called Texas Proviso specifies that mere employment shall not constitute harboring,²¹ but often at the suggestion of INS, employers voluntarily refrain from hiring an alien job applicant unless they are satisfied that he or she is legally entitled to work. The Simpson-Mazzoli bills, now pending in Congress, seek to impose sanctions and burdens on employers in order to discourage the hiring of illegal aliens.²²

Impelled by publicity regarding the volume of illegal entrants, some states, and even municipalities, have enacted laws imposing sanctions on knowing employers of illegal aliens.²³ Although the Supreme Court has upheld the constitutionality of such measures,²⁴ they are largely unenforced in the absence of federal legislation.

IV. General Design of the U.S. Immigration Laws

A brief survey of certain basic concepts of the immigration laws is

officers be U.S. citizens); *Ambach v. Norwich*, 441 U.S. 68 (1979) (teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (police officers).

¹⁷ See *Hampton v. Wong*, 426 U.S. 88 (1976). *Hampton* concerned a U.S. Civil Service Commission regulation that barred aliens from federal employment. The Court noted that overriding national interests may provide justification for a citizenship requirement for federal employment, but found that there must be a legitimate basis for presuming that the citizenship requirement actually advances overriding national interests. The Court found no such basis in the case before it, and thus held the citizenship requirement unconstitutional.

¹⁸ See, e.g., *Campos v. FCC*, 650 F.2d 890 (7th Cir. 1981) (Federal Communications Commission can constitutionally require that commercial radio operators be U.S. citizens).

¹⁹ 8 C.F.R. § 235.1(f) (1983).

²⁰ *Id.* § 109.1 (1983).

²¹ I.N. Act, *supra* note 5, § 274(a)(4), 8 U.S.C. § 1324(a)(4) (1982).

²² S. 529, 98th Cong., 1st Sess. (1983); H.R. 1510, 98th Cong., 1st Sess. (1983). See S. REP. NO. 62, 98th Cong., 1st Sess. (1983); H.R. REP. NO. 115, 98th Cong., 1st Sess. (1983).

²³ See, e.g., CAL. LAB. CODE § 2805(a) (West Supp. 1984).

²⁴ See *De Conas v. Bica*, 424 U.S. 351 (1976) (upholding the constitutionality of CAL. LAB. CODE § 2805(a) (West Supp. 1984)).

helpful in dealing with this subject. First, immigration laws apply to *all* aliens.²⁵ Second, a critical device of control is the law's distinction between immigrants and nonimmigrants. Every alien is presumed to be an immigrant unless he or she specifically qualifies as a nonimmigrant.²⁶ This distinction is important in regard to required documents, length of authorized stay and permitted activities. Third, one must distinguish between the entry documents issued by U.S. consuls overseas and those issued by the INS. U.S. consuls issue visas to aliens who are deemed qualified to come to the United States. Those who qualify as immigrants receive immigrant visas, which are separate documents issued after elaborate procedures, often entailing long delays.²⁷ Those who qualify as nonimmigrants receive a nonimmigrant visa, which consists of a stamp placed and endorsed by the consul in the nonimmigrant's passport to show the holder's nonimmigrant classification and the duration of the visa.²⁸ The consul's visa does not assure the holder's admission to the United States.²⁹ It merely enables him or her to travel to a port of entry in the United States where admissibility will be determined by an INS officer. These determinations, however, usually confirm the consul's visa determination.³⁰ If the holder of an immigrant visa is passed by the immigration officer, he or she is lawfully admitted to the United States as an immigrant and will eventually receive the indicia of that status (the green card).³¹ If the INS officer admits the holder of a nonimmigrant visa, the holder's nonimmigrant status and the length of stay authorized are noted on the entrant's Form I-94.³²

V. Nonimmigrant Classes

A. Definitions and Limitations

The nonimmigrant classes are defined by statute. There are thirteen categories, each identified by visa symbols A through M.³³ The alien's classification is initially indicated by the U.S. consul, in issuing the nonimmigrant visa.³⁴ Nonimmigrant status can be granted, however, and the duration and terms of the nonimmigrant's stay can be fixed, only by the Attorney General, acting through INS.³⁵ Consequently, the INS notations on the Form I-94, and not the consul's nonimmigrant visa, will provide guidance as to the holder's status and authorized activities. An important characteristic of this status is that nonimmigrants must ini-

²⁵ See I.N. Act, *supra* note 5, §§ 201, 212, 8 U.S.C. §§ 1152, 1182 (1982).

²⁶ *Id.* § 214(b), 8 U.S.C. § 1184(b) (1982).

²⁷ *Id.* § 221, 8 U.S.C. § 1201 (1982).

²⁸ *Id.*

²⁹ *Id.* § 221(h), 8 U.S.C. § 1201(h) (1982).

³⁰ *Id.*

³¹ See 1A C. GORDON & H. ROSENFELD, *supra* note 2, § 3.17a.

³² *Id.*

³³ I.N. Act, *supra* note 5, § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1982).

³⁴ See *supra* text accompanying note 28.

³⁵ I.N. Act, *supra* note 5, § 214(a), 8 U.S.C. § 1184(a) (1982).

tially intend to remain temporarily, and eventually to return to their foreign homes. Application for a shift to another nonimmigrant status or to permanent residence, however, is not precluded if the nonimmigrant's plans subsequently change.³⁶

The principal nonimmigrant categories relevant to employment are as follows:

B. Temporary Visitor for Business (B-1)

A primary requirement is that the visitor must have a residence in a foreign country which he or she has no intention of abandoning.³⁷ Although prohibited from being employed by a U.S. company, business visitors usually come to the United States to promote the business of their foreign employers. The precise ambits of the B-1 category are unclear,³⁸ but a useful device is to continue employment and compensation from a foreign employer.

The B-1 visitor is admitted for an initial period up to one year, but extensions of stay, not exceeding six months each, may be granted by INS.³⁹ While there is no maximum, B-1 status is temporary, and its duration will be restricted. B-1 status sometimes leads, however, to an application for change to another status (*e.g.*, H, E, or L), or to permanent residence.

C. Temporary Workers (H)

These nonimmigrants must also have residence in a foreign country and no intention of abandoning it.⁴⁰ As the title suggests, they are admitted to work temporarily for a specific employer. The three divisions of this category and their incidents are as follows:

(1) *Workers of distinguished merit and ability (H-1)*. These are usually professionals or others with exceptional ability.⁴¹ They are coming to work for a temporary period, although the position may be permanent in nature.⁴² They can be admitted for an initial period not to exceed two years, which can be extended for one year intervals without any specified

³⁶ See *id.* § 248, 8 U.S.C. § 1258 (1982); 8 C.F.R. § 248 (1983) (change of nonimmigrant classification); I.N. Act, *supra* note 5, § 245, 8 U.S.C. § 1255 (1982); 8 C.F.R. § 245 (1983) (adjustment to permanent residence status).

³⁷ I.N. Act, *supra* note 5, § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (1982).

³⁸ See 1 C. GORDON & H. ROSENFELD, *supra* note 2, § 2.86.

³⁹ 8 C.F.R. § 214.2(b) (1983).

⁴⁰ I.N. Act, *supra* note 5, § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) (1982).

⁴¹ See, *e.g.*, General Atomic Co., 17 I. & N. Dec. 532 (1980) (civil engineer); Essex Cryogenics Indus., Inc., 14 I. & N. Dec. 196 (1972) (mechanical engineer).

⁴² A previous requirement that the H-1 alien must be coming to a temporary job was eliminated in 1970. See Act of April 7, 1970, Pub. L. No. 91-225, § 1(a), 84 Stat. 116 (1970). See also H.R. REP. NO. 851, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 2750.

limitation, except that their stay must remain temporary.⁴³ INS, however, may question extensions beyond a total stay of three or four years. Foreign doctors are excluded from the H-1 category unless they are coming to the United States to teach or conduct research at "a public or nonprofit private educational or research institution or agency in the United States."⁴⁴

(2) *Other temporary workers who are coming for temporary positions and do not displace U.S. workers (H-2)*. These aliens must present a certificate from the Department of Labor that U.S. workers are unavailable for the position.⁴⁵ They may be admitted for a period not exceeding one year, and one-year extensions may be granted, not exceeding a total stay of three years.⁴⁶ Foreign doctors are excluded.⁴⁷

(3) *Alien trainees (H-3)*. These persons are coming to be trained for foreign employment. There must be a detailed training program, including classroom instruction.⁴⁸ Once again, foreign doctors are excluded. Trainees are admitted for the duration of the approved training program.⁴⁹

A prerequisite to the acquisition of temporary worker H status is a preliminary visa petition, submitted in duplicate by the employer and approved by INS (Form I-129B), together with a thirty-five dollar fee.⁵⁰ The spouse and minor children of an H nonimmigrant get derivative H-4 status⁵¹ on approval of the principal's H petition. No separate petitions are needed for such family members, but they are precluded from accepting employment.⁵²

D. *Treaty Aliens (E)*

The acquisition of treaty alien E status is dependent on a treaty of commerce and navigation between the U.S. and the alien's country of nationality, giving reciprocal rights to reside and conduct business. There are two categories of treaties, although treaties with many countries include both categories. The first type relates to treaty traders (E-1),⁵³ who come to conduct substantial trade principally (at least fifty-one

⁴³ 8 C.F.R. § 214.2(h)(11) (1983).

⁴⁴ This and similar restrictions for other class H nonimmigrants were adopted in 1976, to be effective Jan. 10, 1977. *See* Health Professions and Educational Assistance Act of 1976, Pub. L. No. 94-484, § 601, 90 Stat. 2243, 2300 (1976) (codified in scattered sections of 8 U.S.C.). *See also* H.R. REP. NO. 1612, 94th Cong. 2d Sess. 135 (1976).

⁴⁵ 8 C.F.R. § 213.2(h)(3) (1983).

⁴⁶ *Id.* § 213.2(h)(11).

⁴⁷ I.N. Act, *supra* note 5, § 101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii) (1982).

⁴⁸ 8 C.F.R. § 214.2(h)(4)(iii) (1983).

⁴⁹ *Id.* § 214.2(h)(9).

⁵⁰ I.N. Act, *supra* note 5, § 214(c), 8 U.S.C. § 1184(c) (1982); 8 C.F.R. § 214.2(h)(1) (1983).

⁵¹ I.N. Act, *supra* note 5, § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) (1982).

⁵² *Id.* § 214(c), 8 U.S.C. § 1184(c) (1982).

⁵³ I.N. Act, *supra* note 5, § 101(a)(15)(E) (1982); 8 C.F.R. § 214.2(e) (1983); 22 C.F.R.

percent) with the foreign state of their nationality. The treaty trader can be employed in a supervisory or executive capacity by a foreign person or organization. If the employer is a corporation, at least fifty-one percent of its stock must be owned by treaty traders of the same nationality.⁵⁴

The second category relates to treaty investors (E-2).⁵⁵ The treaty investor comes solely to develop and direct a business in which he has made, or is about to make, a substantial investment.⁵⁶ This requirement entails an actual commitment of the funds.⁵⁷ There is no definition of "substantial investment," but it is desirable to make the investment as large as possible; at least \$50,000 and preferably more.⁵⁸ Employees of a treaty investor qualify for E-2 status if they are of the same nationality and are employed in a responsible capacity. If the employer is a corporation, however, at least fifty-one percent of its stock must be owned by treaty aliens of the same nationality.⁵⁹ Detailed documentation must be submitted concerning the nature of the projected business, the source and amount of the investment, the applicant's role in the business and his prior experience.⁶⁰

No preliminary visa petition is required, and E status can be obtained by submitting the necessary documents to the consul if a visa is sought, or to INS, if approval for a change from another nonimmigrant status is desired. The alien's spouse and minor children acquire deriva-

§ 41.12 (1983). Treaty trader status is presently available under treaties of commerce and navigation to nationals of Argentina, Austria, Belgium, Bolivia, Borneo, China, Colombia, Costa Rica, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Honduras, Iran, Ireland, Israel, Italy, Japan, Korea, Latvia, Liberia, Luxembourg, The Netherlands, Nicaragua, Norway, Pakistan, Paraguay, the Philippines, Spain, Sultanate of Muscat and Oman, Switzerland, Thailand, Togo, Turkey, United Kingdom of Great Britain and Northern Ireland, Vietnam, and Yugoslavia. 6 C. GORDON & H. ROSENFELD, *supra* note 2, at 32-75 to -79.

⁵⁴ 22 C.F.R. § 41.40 (1983). See *Tokyo-Sansei v. Esperdy*, 298 F. Supp. 945 (S.D.N.Y. 1969) (electronic technician unqualified); *Nippon Express, Inc. v. Kennedy*, 261 F. Supp. 561 (S.D.N.Y. 1966) (bookkeeper unqualified).

⁵⁵ Treaty provisions presently permit treaty investor status for nationals of Argentina, Austria, Belgium, China, Colombia, Costa Rica, Ethiopia, France, Honduras, Italy, Liberia, Luxembourg, Norway, Paraguay, Spain, Switzerland, Thailand, Togo, Yugoslavia, United Kingdom of Great Britain and Northern Ireland, Germany, Iran, Japan, Korea, The Netherlands, Nicaragua, Pakistan, Sultanate of Muscat and Oman, Vietnam, and the Philippines. 6 C. GORDON & H. ROSENFELD, *supra* note 2, at 32-81 to -84.

⁵⁶ 22 C.F.R. § 41.40(a) (1983). See *Matter of Damioli*, 17 I. & N. Dec. 303 (1980) (application for treaty investor status denied because applicant had not invested capital in the subject enterprise). Cf. *Matter of N.S.*, 17 I. & N. Dec. 426 (1957) (granting treaty investor status to an employee of a corporation, where more than 50% of the corporation's stock was owned by persons of the applicant's nationality, although applicant had not himself invested capital in the business).

⁵⁷ *Matter of Csonka*, 17 I. & N. Dec. 254 (1978) (denying application for change to treaty investor because applicant's investment was a loan guaranteed by another); *Matter of Lee*, 15 I. & N. Dec. 187 (1976) (denying application for treaty investor status because applicant's investment was insubstantial, and because his promise to invest 51% at some future date was too speculative).

⁵⁸ *Csonka*, 15 I. & N. Dec. at 187. See 1 C. GORDON & H. ROSENFELD, *supra* note 2, § 2.11a(4)c.

⁵⁹ 22 C.F.R. § 41.41(b). See *Matter of King*, 17 I. & N. Dec. 260 (1978).

⁶⁰ See 1 C. GORDON & H. ROSENFELD, *supra* note 2, § 2.11b.

tive E-1 or E-2 status upon the grant of such status to their principal.⁶¹ Treaty aliens are admitted for an initial period of one year, renewable indefinitely as long as they continue to operate the business.⁶² Often they continue in this status for many years. Unlike visitors and temporary workers, treaty aliens are not required to retain a specific foreign residence, but they must intend eventually to leave the United States.⁶³

E. Intracompany Transferees (L)

This category of nonimmigrants has become increasingly important in current immigration practice. It was originally enacted in 1970, primarily to facilitate the transfer of personnel by multinational corporations.⁶⁴ It may also apply, however, to the personnel of any organizations which qualify under its terms.

The statute grants nonimmigrant status to:

[A]n alien who, immediately preceding the time of this application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him.⁶⁵

The intracompany transferee is designated as L-1 and his spouse and minor children as L-2.⁶⁶

The L-1 status may be acquired only upon fulfillment of the following important requirements: First, the alien must have been employed abroad continuously by "a firm or corporation or legal entity or an affiliate or subsidiary thereof" for at least one year immediately preceding application for admission to the United States.⁶⁷ Temporary stay in the United States while still in the employ of the foreign company will be regarded as part of the requisite continuous employment, but only after the requisite one year of employment abroad has been completed.⁶⁸ "Firm" and "legal entity" are expansive terms which include partnerships and other associations⁶⁹ and possibly even sole proprietorships.⁷⁰

Second, the transferee must be coming to work for the same organi-

⁶¹ I.N. Act, *supra* note 5, § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E) (1982).

⁶² 8 C.F.R. § 214.2(e).

⁶³ I.N. Act, *supra* note 5, § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E) (1982).

⁶⁴ Act of April 7, 1970, Pub. L. No. 91-225, § 1(b), 84 Stat. 116, 116 (codified at 8 U.S.C. § 1101(a)(15)(K), (L) (1982)). *See* H.R. REP. NO. 851, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 2750.

⁶⁵ I.N. Act, *supra* note 5, § 101(a)(15)(L) (1982).

⁶⁶ *Id.*

⁶⁷ *Id.* The employment must be by "a firm or corporation or legal entity or an affiliate or subsidiary thereof" *Id.*

⁶⁸ *Matter of Kloeti*, 18 I. & N. Dec. —, I.D. 2918 (R.C. 1981); *Continental Grain Co.*, 14 I. & N. Dec. 140 (1972).

⁶⁹ *Matter of Hughes*, 18 I. & N. Dec. —, I.D. 2917 (Comm. 1982).

⁷⁰ *Johnson-Laird, Inc. v. INS*, 537 F. Supp. 52 (D. Or. 1981).

zation or a branch, affiliate or subsidiary thereof. There is no requirement that this organization be a U.S. concern, or that the transferee be coming to an existing office.⁷¹ A bona fide purpose to set up a new office will be acceptable.⁷² The existence of a subsidiary or affiliate relationship is usually shown by mutual control. Such control is often expressed by at least fifty-one percent common stock ownership, but a lesser proportion may be acceptable to show control of a large corporation.⁷³

Third, the statute covers only employment "in a capacity that is managerial, executive, or involves specialized knowledge."⁷⁴ The statute is couched in disjunctive terms and covers employment in any one of the three capacities.⁷⁵ Definitions of the three statutory terms are set forth somewhat restrictively in a 1983 amendment of the regulations.⁷⁶ Moreover, although the statute is not clear on this point, it is the administrative view that the employment abroad must be in one of the three enumerated capacities.⁷⁷

Fourth, while the statute requires that the transferee be coming "temporarily," as in some other nonimmigrant categories it also requires that the alien retain an unabandoned residence in a foreign country.⁷⁸ This is because the transferee normally is expected to move on to another post in a foreign country after his tour of duty in the United States is completed. Indeed, a 1983 amendment of the regulations specifies that where the transferee is also a principal owner of the organization, evi-

⁷¹ Matter of LeBlanc, 13 I. & N. Dec. 816 (1971).

⁷² *Id.*

⁷³ Matter of Hughes, 18 I. & N. Dec. —, I.D. 2917 (Comm. 1982); Tessel, Inc., 17 I. & N. Dec. 631 (1981).

⁷⁴ I.N. Act, *supra* note 5, § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) (1982).

⁷⁵ Matter of Colley, 18 I. & N. Dec. —, I.D. 2881 (Comm. 1981); Matter of Vaillancourt, 13 I. & N. Dec. 654 (1970).

⁷⁶ 48 Fed. Reg. 41,146 (1983) (to be codified at 8 C.F.R. § 214.2(f)(1)(ii)). The regulations state as follows:

(A) "Managerial capacity" means an assignment within an organization in which the employee directs the organization or a customarily recognized department or subdivision of the organization, controls the work of other employees, has the authority to hire and fire or recommend those actions as well as other personnel actions (promotion, leave authorization, etc.), and exercises discretionary authority over day-to-day operations. This does not include the first-line level of supervision unless the employees supervised are managerial or professional.

(B) "Executive capacity" means an assignment within an organization in which the employee directs the management and establishes organizational goals and policies, exercises a wide latitude of discretionary decision-making, and receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the business.

(C) "Specialized knowledge" means knowledge possessed by an individual which relates directly to the product or service of an organization or to the equipment, techniques, management, or other proprietary interests of the petitioner not readily available in the job market. The knowledge must be relevant to the organization itself and directly concerned with the expansion of commerce or it must allow the business to become competitive in the market place.

Id.

⁷⁷ Memorandum of the Acting Commissioner of the INS, no. CO 214 L-P, para. 5 (Apr. 9, 1981).

⁷⁸ See I.N. Act, *supra* note 5, § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) (1982).

dence of a specific plan for a future transfer to a foreign country must be submitted.⁷⁹ There is, however, no obstacle to a subsequent change of plans and the presentation of an application for permanent residence.⁸⁰

Like the temporary worker, the transferee can acquire nonimmigrant status only upon the employer's submission of a visa petition on his behalf, and its approval by INS.⁸¹ The petition is filed in duplicate on Form I-129B with the INS office having jurisdiction over the place of intended employment.⁸² It must be accompanied by a fee of thirty-five dollars, and by detailed documentation showing the length of time and the nature of the employment abroad; the legitimacy of the foreign employer (including incorporation papers, bank statements, tax and financial records, nature and volume of business, number of employees, etc.); and the legitimacy of the U.S. business, including incorporation papers, if any, evidence of the ownership of the foreign and U.S. companies, business, bank and accountant's records (if available), total number of persons to be employed there, and a lease or deed showing that physical premises for the new establishment have been acquired.⁸³

Approval of the visa petition may be for an initial period of up to three years.⁸⁴ Upon such approval, the spouse and minor children of the beneficiary, accompanying or following to join him, are entitled automatically to derivative status (L-2), without the need for the submission of visa petitions on their behalf.⁸⁵ Extensions of the transferee's stay may be requested in one-year increments until the temporary mission in the United States is completed.⁸⁶ This status, however, is not intended to continue indefinitely, and extensions beyond four or five years may be questioned by INS.

VI. Change from One Nonimmigrant Status to Another

The law permits a person in the United States to seek a change from one nonimmigrant status to another.⁸⁷ For present purposes, such applications occur most frequently when B-1 business visitors, B-2 tourists, or F-1 students seek to change to H temporary workers, E treaty aliens, or L intracompany transferees.

The applicant for change of nonimmigrant status must satisfy the following requirements: First, the applicant must have been lawfully ad-

⁷⁹ 48 Fed. Reg. 41,146 (1983) (to be codified at 8 C.F.R. § 214.2(f)(1)(iii)(B)).

⁸⁰ Indeed, 20 C.F.R. § 656.10(d)(1) (1983) accords favorable treatment to residence applications by the managerial and executive categories of intracompany transferees.

⁸¹ 8 C.F.R. § 214.2(f)(1) (1983). The 1983 amendments to the regulations, *see* 48 Fed. Reg. 41,146 (1983) (to be codified at 8 C.F.R. § 214.2(f)(1)(iii)(C)), permit the filing of blanket petitions by certain large companies who frequently transfer employees.

⁸² 8 C.F.R. § 214.2(f)(1) (1983).

⁸³ 8 C.F.R. § 214.2(f)(2) (1983).

⁸⁴ 8 C.F.R. § 214.2(f)(1) (1983).

⁸⁵ *Id.*

⁸⁶ 8 C.F.R. § 214.2(f)(3) (1983).

⁸⁷ I.N. Act, *supra* note 5, § 248, 8 U.S.C. § 1258 (1982); 8 C.F.R. § 248 (1983).

mitted to the United States as a nonimmigrant;⁸⁸ second, the applicant must be continuing to maintain his current nonimmigrant status,⁸⁹ which means that the terms of admission have not been violated, and that the authorized status has not been overstayed.⁹⁰ An untimely application may be accepted if the delay was reasonably excusable.⁹¹ Third, the applicant must be qualified and able to show eligibility for the new status.⁹² The application is discretionary and can be denied in the exercise of sound discretion.⁹³ Categories of nonimmigrants ineligible to change nonimmigrant status include transits (C), crewmen (D), fiances or fiances (K), and exchange visitors (J) subject to the two-year foreign residence requirement.⁹⁴

Applications for change of nonimmigrant status are submitted on Form I-506 to the district director at the place of temporary U.S. sojourn. They must be accompanied by a fee of fifteen dollars for each application, the I-94 Forms of the applicant and his or her family, and documents to prove that the applicant has been maintaining current nonimmigrant status and is eligible for the new status.⁹⁵

VII. Immigrants

A. Qualification

Every alien who seeks to achieve permanent residence status as an immigrant must satisfy three major categories of requirements: (1) he must demonstrate that he is not inadmissible under any of the thirty-three separate grounds for exclusion set forth in the statute;⁹⁶ (2) such aliens must qualify under the established numerical limitations, which are discussed below;⁹⁷ and (3) they must comply with prescribed procedural requirements, which will be discussed in subpart B of this section.

In assessing an employee's eligibility for permanent residence status, the first inquiry usually concerns the impact of the numerical limitations. The law establishes an annual worldwide ceiling of 270,000 for prospec-

⁸⁸ 8 C.F.R. § 248.1(a) (1983).

⁸⁹ *Id.*

⁹⁰ *Matter of Kyrakrakos*, 10 I. & N. Dec. 646 (1943) (application to change status from visitor to student denied because applicant violated visitor status by engaging in employment).

⁹¹ 8 C.F.R. § 248.1(b) (1983).

⁹² *Kun Young Kim v. Dist. Director of the I.N.S.*, 586 F.2d 713 (9th Cir. 1978) (application to change status from student to treaty investor denied because applicant was unqualified for new status).

⁹³ *Patel v. Minnix*, 663 F.2d 1042 (11th Cir. 1981).

⁹⁴ I.N. Act, *supra* note 5, § 248, 8 U.S.C. § 1258(1)-(3) (1982).

⁹⁵ 8 C.F.R. § 248.3(a) (1983).

⁹⁶ I.N. Act, *supra* note 5, § 212(a), 8 U.S.C. § 1182(a) (1982). The specific statutory grounds will not be discussed further in this article, except to note that they relate generally to aliens who are designated as undesirable on physical, mental, moral, economic, or other specific grounds.

⁹⁷ I.N. Act, *supra* note 5, §§ 201-203, 8 U.S.C. §§ 1151-1153 (1982). *See infra* notes 98-118 and accompanying text.

tive immigrants,⁹⁸ however, the immediate relations of U.S. citizens are excluded.⁹⁹ Therefore, an employer can anticipate quick immigration clearance, upon compliance with the prescribed procedures, of an employee who is the immediate relative of a U.S. citizen.

Within the annual 270,000 limitation there are six preferences which are allotted in sequence.¹⁰⁰ The First, Second, Fourth, and Fifth Preferences further the principle of family unification, which is a major concern of the immigration laws.¹⁰¹ The Third and Sixth Preferences relate to aliens seeking permanent residence status on the basis of a job offer in the United States.¹⁰² The Third Preference is for professionals or aliens with exceptional ability in the sciences or arts; the Sixth Preference is for other aliens capable of performing skilled or unskilled labor. Attainment of either of these two preferences entails a showing that there is a shortage of qualified and available persons in the United States for the position in question.¹⁰³ Professional is defined "to include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers."¹⁰⁴ This open-ended definition leaves a large area to be defined by the familiar process of inclusion and exclusion.¹⁰⁵

B. Procedure

Permanent residence can be acquired in one of two ways. Outside the United States, the alien can apply for an immigrant visa at a U.S. consulate in a foreign country.¹⁰⁶ A qualified alien in the United States can apply for permanent residence without leaving the United States through a process known as adjustment of status.¹⁰⁷ Adjustment of sta-

⁹⁸ *Id.* § 201(a), 8 U.S.C. § 1151(a) (1982). There is also a limit of 20,000 immigrants per year from any one country. *Id.* § 202(a), 8 U.S.C. § 1152(a) (1982).

⁹⁹ *Id.* § 202(b), 8 U.S.C. § 1152(b) (1982). Also excluded from the quota restrictions are certain special immigrants, and refugees, who receive separate annual allotments.

¹⁰⁰ I.N. Act, *supra* note 5, § 203(a), 8 U.S.C. § 1153(a) (1982). The child or spouse of a preference immigrant is entitled to the same preference as the principal. *Id.* § 203(a)(8), 8 U.S.C. § 1153(a)(8) (1982). There is also provision for a so-called nonpreference group, which can be allotted any remainder of the annual 270,000 not used by the six preference groups. Because of overwhelming demand in recent years, there is no possibility for availability of any nonpreference visas in the foreseeable future.

¹⁰¹ The First Preference is for adult unmarried children of U.S. citizens; the Second is for spouses and children of resident aliens; the Fourth is for married children of U.S. citizens; and the fifth is for brothers and sisters of adult U.S. citizens. *Id.* §§ 203(a)(1), (2), (4), (5), 8 U.S.C. § 1153(a)(1), (2), (4), (5) (1982).

¹⁰² *Id.* § 203(a)(3), (6), 8 U.S.C. § 1153(a)(3), (6) (1982).

¹⁰³ *Id.*

¹⁰⁴ *Id.* § 101(a)(32), 8 U.S.C. § 1101(a)(32). Immigration opportunities for foreign doctors have been curtailed severely by the Health Professions and Educational Assistance Act of 1976, Pub. L. No. 94-484, § 601, 90 Stat. 2243, 2301 (1976) (codified in scattered sections of 8 U.S.C.). See *supra* note 44 and accompanying text. See also 2 C. GORDON & H. ROSENFELD, *supra* note 2, § 2.27d.

¹⁰⁵ For a more detailed discussion of the definition of professional pursuits, see 1 C. GORDON & H. ROSENFELD, *supra* note 2, § 2.27d.

¹⁰⁶ See 1A C. GORDON & H. ROSENFELD, *supra* note 2, § 3.7d.

¹⁰⁷ I.N. Act, *supra* note 5, § 245, 8 U.S.C. § 1255 (1982). See 2 C. GORDON & H. ROSENFELD, *supra* note 2, § 7.7.

tus is available to aliens who have been inspected and admitted as non-immigrants or paroled into the United States.¹⁰⁸ The adjustment process is thus unavailable to one who has entered surreptitiously.¹⁰⁹ The statute specifically bars this remedy for aliens who have entered as crewmen or who (except for immediate relatives of U.S. citizens) have worked without authorization before filing the application for adjustment.¹¹⁰

The adjustment applicant's situation is assimilated to that of an applicant for an immigrant visa. Therefore, applicants must show that they are admissible to the United States, and that an immigrant visa is immediately available to them.¹¹¹ This is a discretionary remedy, and in exceptional situations it may be denied in the exercise of discretion.¹¹² An unqualified or unsuccessful adjustment applicant, however, is not precluded from seeking an immigrant visa at a U.S. consulate.

Persons seeking Third or Sixth Preference status must first obtain a labor certification from the U.S. Department of Labor, certifying that U.S. workers are unavailable and that prevailing wages are to be offered.¹¹³ Labor certifications usually involve a dilatory and complicated process of advertising, posting, recruitment, and submission of an application (Form ETA 750) to the local State Employment Service office for eventual transmission to the U.S. Department of Labor.¹¹⁴ Advertising and Labor Department consideration are not necessary, however, for L-1 managerial and executive personnel (but not personnel qualifying because of specialized knowledge), who are covered by Schedule A of the Department of Labor regulations.¹¹⁵ These regulations enable the employer to submit the labor certification application directly to INS.¹¹⁶

If the Third or Sixth Preference immigrant has received a labor certification or is on Schedule A, the employer then submits a visa petition, Form I-140, on the employee's behalf to INS, seeking approval of Third or Sixth Preference status. Approval of the petitions confers derivative Third or Sixth Preference status on the alien's spouse and children. It also entitles the alien to apply for permanent residence when his priority date is reached, by either seeking an immigrant visa from a U.S. consul, or, if he is in the United States, by submitting an application for adjust-

¹⁰⁸ I.N. Act, *supra* note 5, § 245, 8 U.S.C. § 1255 (1982). See 2 C. GORDON & H. ROSENFIELD, *supra* note 2, § 7.7.

¹⁰⁹ See 2 C. GORDON & H. ROSENFIELD, *supra* note 2, § 7.7b.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Jain v. INS, 612 F.2d 683 (2d Cir. 1979), *cert. denied*, 446 U.S. 937 (1980) (INS could deny application for change to resident alien status, where applicant had preconceived intent to remain permanently in the United States after entering on a temporary nonimmigrant visa); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968).

¹¹³ I.N. Act, *supra* note 5, § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1982).

¹¹⁴ See 20 C.F.R. §§ 656.21-656.21a (1983).

¹¹⁵ *Id.* § 656.22(f)(1) (1983).

¹¹⁶ *Id.*

ment of status to INS.¹¹⁷

The timing of the acquisition of permanent residence status depends on the quota situation. There are often long waiting lists and delays.¹¹⁸ The Third Preference immigration quota is often current, except for some areas with exceptionally heavy demand, such as Mexico, the Philippines, and Hong Kong. Therefore, most Third Preference immigrants can seek permanent residence immediately after their Third Preference visa petition has been approved. If they are already in the United States, the visa petition and the application for adjustment of status, Form I-485, can be simultaneously submitted to INS.¹¹⁹

In contrast, the Sixth Preference quota is currently almost two years in arrears, and an alien usually is delayed in acquiring permanent residence. The alien's priority date, however, is fixed when he submits his application for a labor certification. Completion of the labor certification process usually takes many months, depending on the area of the United States where it is submitted. Therefore, Sixth Preference immigrants ordinarily face a reduced waiting period after approval of their labor certification application before they can apply for permanent residence.

VIII. Conclusion

The foregoing discussion has described some of the immigration problems that must be confronted by aliens who seek employment in the United States. Recent experience has shown that the difficulties and delays encountered in the immigration process will increase. Those who seek to deal with that process should know what they are doing, since a

¹¹⁷ I.N. Act, *supra* note 5, § 293(c), 8 U.S.C. § 1153(c) (1982). An alien's priority date ordinarily is fixed by the date of submission of a visa petition to INS. In the case of an alien with an approved labor certification, an earlier priority date is allowed—the date the labor certification application (later approved) is submitted to the local state employment service office or to INS. 8 C.F.R. § 204.1(c)(2) (1983).

¹¹⁸ As of October, 1983, the most recent applications granted (by country and preference category) were as follows:

CHARGEABILITY	PREFERENCE						NON PREFERENCE
	1ST	2ND	3RD	4TH	5TH	6TH	
ALL CHARGE- ABILITY AREAS EXCEPT THOSE LISTED BELOW	C	01-15-83	C	C	08-01-80	07-01-81	U
CHINA- mainland born	C	01-15-83	C	C	01-01-70	U	U
INDIA	C	01-15-83	01-01-83	C	07-15-80	10-08-80	U
KOREA	C	01-15-83	C	C	07-01-79	07-01-81	U
MEXICO	C	09-01-74	U	U	U	U	U
PHILIPPINES	C	09-15-79	09-01-70	05-22-77	11-01-71	09-22-79	U
HONG KONG	C	07-08-77	10-01-74	11-24-78	11-01-72	01-22-79	U

State Department Monthly List of Immigration Quota Availabilities (Oct. 1983).

¹¹⁹ 8 C.F.R. § 245.2(a)(2) (1983).

careless or uninformed approach often may have unfortunate consequences. The foregoing summary has sought to demonstrate that the complexities of the law can be overcome, and the desired result accomplished, by careful planning and by knowledgeable utilization of the prescribed procedures.